

1418001 (Migration) [2016] AATA 3473 (26 February 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Munkyoung Pyo
CASE NUMBER:	1418001
DIBP REFERENCE(S):	CLF2013/117349
MEMBER:	Wendy Banfield
DATE:	26 February 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 26 February 2016 at 1:18pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 October 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 27 May 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because it was found that the applicant did not meet the Schedule 3 criteria and the delegate was not satisfied that there were compelling reasons for not applying those criteria.

4. *Background*

5. The applicant is a citizen of the Republic of Korea and is 38 years of age. He came to Australia on 1 October 2008 as the holder of a subclass 976 visitor visa. That visa ceased on 1 January 2009 and the applicant did not depart Australia. He did not hold a substantive visa at the time the partner visa application was lodged.
6. The sponsor is an Australian citizen who was born in South Korea and is 28 years of age. The applicant and sponsor claim they met in March 2009 while living in a share house. They married on 24 February 2013 and their son, Noah Pyo was born on 4 March 2015.
7. Prior to the hearing, the following information was submitted in evidence:
 - Birth certificate for Noah Pyo born on 4 March 2015;
 - Separate phone records for the applicant and sponsor at the same address in Eastwood, NSW from 2012;
 - Separate ANZ bank account statements for the applicant and sponsor at the same address in Roma, Queensland from 2012;
 - First page of a Residential Tenancy Agreement in the name of the applicant and sponsor for a property in Eastwood, NSW dated 20 May 2014;
 - Certificate of Marriage dated 24 February 2013;
 - Medical certificate dated 24 September 2014 stating the sponsor is 16 weeks pregnant;
 - Travel documents in the name of the applicant and sponsor from 2012;
 - Photos of the applicant and sponsor and ultrasound image of the baby;
 - Australian Citizenship Certificate in the name of the sponsor dated 28 October 2014.

8. The applicant appeared before the Tribunal on 10 November 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Arang Lee and a witness, Mr Sung Sam Shin. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
9. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the applicant satisfies the Schedule 3 criteria and, if he does not, whether there are compelling reasons for not applying those criteria.

DOES THE APPLICANT MEET SCHEDULE 3 CRITERIA, OR SHOULD THOSE CRITERIA BE WAIVED?

12. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
13. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

CRITERION 3001

14. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
15. The applicant arrived in Australia on 1 October 2008 as the holder of a subclass 976 visitor visa that ceased on 1 January 2009. The applicant did not hold a substantive visa after the date his visitor visa ceased. The application for a partner visa which is the subject of this review was not lodged until 27 May 2013.
16. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

COMPELLING REASONS

17. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
18. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The compelling reasons for not applying the Schedule 3 criteria must be reasons which are

relevant to the purpose of permitting the person to make an application for a spouse visa in Australia: *Monakova v MIMA* [2006] FMCA 849 at [27]-[28]. The question of whether there are compelling reasons for not applying the Schedule 3 criteria must be considered in relation to circumstances existing at the time of application: *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 at [39].

19. The Tribunal considered whether the parties have been in a long term relationship. They claim to have met and commenced a relationship in 2009 and have been married since 24 February 2013. The Tribunal has considered the applicant and sponsor's claims and evidence in this regard. The applicant and sponsor had only been married for three months at the time the visa application was submitted. It was claimed that they first met and began a relationship in 2009 while living in a share house.
20. The applicant submitted two photos of himself and the sponsor that were claimed to have been taken in March 2010. Other photos were said to be from 2012 and wedding photos are dated 24 February 2013. The same photos depicting the applicant and sponsor together were submitted to the Department. Apart from wedding photos in which several other people appear, the photos show only the applicant and sponsor. While the Tribunal accepts the photos demonstrate the applicant and sponsor have spent time together, they are not evidence of a long term relationship. The evidence of the witness, Mr Sung Sam Shin supports the parties' claims of being in a spouse relationship; however, Mr Shin only knows the applicant and sponsor through their attendance at church. Based on his evidence at the hearing, Mr Shin did not appear to have a personal or social relationship with the applicant.
21. Bank statements, phone records and evidence of a lease agreement support claims that the applicant and sponsor have lived at the same address and have been in contact. Travel documents from 2012 indicate the parties have travelled to the same places. However, this evidence does not demonstrate the applicant and sponsor have been in a long term spouse relationship prior to submitting the visa application. The Tribunal accepts the applicant and sponsor are validly married and appear to have a child of the relationship. However, the evidence submitted to the Tribunal does not support the existence of a long term relationship for the purposes of waiving the Schedule 3 criteria.
22. The Tribunal has not assessed the applicant and sponsor's claims of a genuine and continuing spouse relationship since the date of the partner visa application. Consideration of compelling reasons for the waiver of the Schedule 3 criteria should be considered in relation to circumstances existing at the time of application. The requirement in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. As this is the basic requirement for any Partner visa application, the requirement to show a compelling reason for not applying the Schedule 3 criteria in cl.820.211(2)(d)(ii) must be in addition to parties being in an exclusive and genuine and continuing relationship. Simply being in a genuine and continuing relationship does not, of itself, provide a compelling reason for not applying the Schedule 3 criteria.
23. The applicant told the Tribunal he remained in Australia after his visitor visa expired as he was hoping to find employment and obtain sponsorship for a visa through an employer. He said he had to work and improve his skills. According to the applicant, he had sponsorship offers from employers in Australia but nothing materialised. He said businesses were interested in exploiting his work skills rather than sponsoring him. The applicant said he formed the intention to migrate to Australia because as a vehicle detailer, he was treated better in Australia than he had been in Korea. He said he remained in Australia without a visa because he had met his wife and was concerned that he would be unable to return if he went back to Korea to lodge a partner visa application.

24. The applicant said now that he and the sponsor have a baby, he needs to remain in Australia to support them as neither has any family in this country. The sponsor told the Tribunal that she had not wanted the applicant to go offshore as she had heard that it could be three years for his visa application to be processed. She said that now they have a baby, she needs the applicant to stay with her for financial support. The sponsor claimed it would be unfair to separate the applicant from his child. The sponsor said she had been in Australia for seven years and it would be difficult and daunting for her to return to Korea with the applicant. She said they would have to start from scratch all over again.

25. *Overall assessment*

26. The Tribunal has considered the applicants claims and is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
27. There is insufficient evidence to demonstrate the applicant and sponsor were in a long term relationship at the time of submission of the partner visa application on 27 May 2013. The applicant explained his reasons for remaining in Australia without a substantive visa after his visitor visa ceased but those reasons are not compelling, particularly when the applicant remained in Australia unlawfully for over 4 years before seeking to regularise his visa status. It is understandable that the applicant and sponsor would prefer the applicant to remain in Australia and that there may be a level of hardship if the applicant is required to go off-shore. There is no requirement for the sponsor to leave Australia while the applicant makes a partner visa application off-shore, that is a matter for the parties themselves to decide. Although the applicant and sponsor have provided evidence that they now have a child of the relationship, the baby was not born, and the sponsor was not expecting a child at the time of the visa application, which is the time at which compelling circumstances should be considered.
28. The Tribunal has considered all the circumstances of the applicant and the sponsor both individually and cumulatively at the time of the application. The Tribunal is not satisfied that when considered alone or in combination that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii). There is no information before the Tribunal that the applicant would meet any of the alternate criteria in cl.820.211).
29. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

30. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Wendy Banfield
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

SCHEDULE 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and

- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
 - (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
 - (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.